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No. 79-1624

In the Supreme Court of the United States

OCTOBER TERM, 1979

LOCAL 450, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO, PETITIONER

v.

DONN PRODUCTS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The Board found that, during petitioner's (herein "the Union") organizing campaign, Donn Products, Inc. and American Metal Corp. (herein "the Company") violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by granting employees binding arbitration procedures and a system of "preferred" bank loans; by promising to improve its bonus system and to provide dental insurance; by coercive interrogation; and by threatening to discharge employees, to prosecute them, to discipline them more harshly and to move its business (Pet. App. A-11 to A-12, A-41 to A-58, A-74).

The Board, reversing the Administrative Law Judge, found that the Company further violated Section 8(a)(1) by telling the employees that it intended to engage in sham bargaining if the Union were selected as the

employees' representative. This finding was based on a speech delivered two days before the election by Company President Brown, in which he "made statements that indicate he was willing to engage in a type of bargaining which amounts to no more than a show" (Pet. App. A-13 to A-14).

Finally, the Board found that the Company violated Section 8(a)(5) and (1), of the Act, 29 U.S.C. 158(a)(5) and (1), on July 9, 1975, when the Union held authorization cards from a majority of the unit employees, and by thereafter unilaterally changing working conditions and by transferring operations to a new location without consulting the Union (Pet. App. A-19, A-21 to A-22). The Board, reversing the Administrative Law Judge, issued a *Gissel* bargaining order,[1] stating (Pet. App. A-19 to A-20):

> Here, Respondent's unlawful conduct began early in the union campaign, continued through the election, and resulted in the dissipation of the Union's majority status.[2] Thus, Respondent interrogated and threatened to discharge Steyer, a member of the union organizing committee, and threatened to prosecute employee Wasik for distributing union literature in the plant. It granted benefits to employees by instituting an arbitration procedure during the campaign and by materially assisting employees to obtain personal bank loans. Finally, Respondent made repeated threats that it would engage in sham bargaining should the Union

[1]See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

[2]The Union lost the representation election, which was held on September 12, 1975, by a vote of 115 to 148. The Board found that the unfair labor practices interfered with the election and set it aside (Pet. App. A-60, A-78).

> be selected, and threatened economic retaliation by closing the plant in the event the Union won the election.
>
> These unfair labor practices, directly affecting all of Respondent's employees, were intended to, and did in fact, undermine the Union's majority strength.
> * * *

2. The court of appeals upheld all of the Board's Section 8(a)(1) findings except for the sham-bargaining finding (Pet. App. A-4). Respecting the latter, the court found that the Board quoted only those portions of Brown's speech "from which an intention not to bargain in good faith might be inferred, if those statements stood alone," but failed to "quote or even mention statements which indicated that good faith bargaining would take place if the union won the upcoming election * * *." The court added that, "when, the speech is considered in its entirety, we agree with the administrative law judge that it cannot be considered an advance threat not to bargain in good faith if the Union should be certified" (Pet. App. A-5).

The court also refused to enforce the *Gissel* bargaining order because "[t]he unfair labor practices which occurred were of a kind whose effect would quickly dissipate" (Pet. App. A-8). The court pointed out that two of 288 unit employees, who worked in three separate plants, were interrogated or threatened, there were no general threats to punish employees for union activities, no one was discharged. The grants and promises of benefits "can be eliminated from a future election by a cease and desist order." Although the Company threatened to close one of its plants and subsequently did close it, the Board found that the decision to close was based on economic factors, and the Company offered—and all affected employees accepted—transfers to other nearby plants (Pet. App. A-7).

The court concluded (Pet. App. A-8 to A-9):

> If the record merely caused doubt as to the Board's reasons for ordering bargaining we would remand for further explication of its reasons. [Citations omitted.] However, though the Board gave little explanation for its decision in the present case, it is clear that the decision was determined to a large extent by the finding that there had been a threat of sham bargaining. With this violation eliminated we agree with the administrative law judge that a bargaining order was not justified. It has now been more than four years since the election was held. We believe the purposes of the Act will be best served by an early rerun election.

3. The Union's petition seeks review of the decision of the court of appeals insofar as it denied enforcement of the Board's sham bargaining finding and its *Gissel* bargaining order.

While the Board believes that substantial evidence supports its finding that the Company threatened to engage in sham bargaining and that therefore the court of appeals should have sustained that finding, the Board did not file its own petition because the court's refusal to sustain this finding presents principally an evidentiary issue, which this Court has indicated it ordinarily will not review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951). In the Board's view, the court of appeals refused to enforce the bargaining order not, as petitioner states (Pet. 3, 33-34), "simply because the employer discontinued its unlawful activity during the several years between the * * * election * * * and the [court's] judgment * * *." Rather, the court found that, on this record, and particularly in light of its rejection of the sham bargaining finding, a bargaining order was not warranted.

However, should the Union's petition be granted, the Board will defend its decision and order.

Respectfully submitted.

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